82-425

No. _____

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IN THE
SUPREME COURT
OF THE UNITED STATES

OCTOBER TERM 1982

EX PARTE STEPHEN A. McWILLIAMS

ON WRIT OF CERTIORARI
TO THE TEXAS COURT OF CRIMINAL APPEALS

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

I. WHETHER THE FACTS KNOWN TO THE TRIAL COURT RAISED SUFFICIENT DOUBT AS TO McWILLIAMS' COMPETENCY TO REQUIRE THAT THE TRIAL COURT DETERMINE McWILLIAMS' COMPETENCY BEFORE HE PLED GUILTY.

II. WHETHER THE TEXAS COURT OF CRIMINAL APPEALS UNEXPECTEDLY ABANDONED TEXAS' CARVING DOCTRINE AND RETROACTIVELY AND AS AN EX POST FACTO LAW UPHELD McWILLIAMS' CONVICTION FOR THE OFFENSE OF AGGRAVATED KIDNAPPING.

PARTIES

Stephen A. McWilliams was petitioner below. The State of Texas was respondent.

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OPINIONS BELOW

The opinions of the Texas Court of Criminal Appeals are reported at 634 S.W.2d 815 (Tex. Crim. App. 1982).

JURISDICTION

The original decision of the Texas Court of Criminal Appeals granting in part petitioner's Writ of Habeas Corpus was delivered October 15, 1980. (App. I) The Court's decision concerning the motion for rehearing by respondent was delivered May 12, 1982. (App. II) The Court's denial of petitioner's second motion for rehearing occurred on July 14, 1982. (App. IV) This Court has jurisdiction to review the judgment by Writ of Certiorari under 28 U.S.C. § 1257(3).

CONSTITUTIONAL PROVISIONS

U.S. CONST. art. I, § 10, cl. 1.

> No State shall . . . pass any . . . ex post facto law . . . .

U.S. CONST. amend. XIV, § 1.

> All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the

State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty or property, without due process of the law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATE STATUTES

TEX. STAT. ANN. Code of Crim. Proc. art. 46.02 (Vernon 1979).

Sec. 2. (a) The issue of defendant's incompetency to stand trial shall be determined in advance of the trial on the merits if the court determines there is evidence to support a finding of incompetency to stand trial on its own motion or on written motion by the defendant or his counsel filed prior to the date set for trial on the merits asserting that the defendant is incompetent to stand trial.

Sec. 4. (a) If the court determines that there is evidence to support a finding of incompetency to stand trial, a jury shall be impaneled to determine the defendant's competency to stand trial. This determination shall be made by a jury that has not been selected to determine the guilt or innocence of the defendant. If the defendant is found incompetent to stand trial, a further hearing may be held to determine whether or not the defendant is mentally ill and requires observation and/or treatment or hospitalization in a mental hospital for his own welfare and protection or the protection of others or

whether he is a mentally retarded person as defined in The Mentally Retarded Persons Act (Article 3871b, Vernon's Texas Civil Statutes), and requires commitment to a mental retardation facility.

STATEMENT OF THE CASE

Alleged Crime

The State of Texas alleged that on March 21, 1975, Stephen McWilliams entered and robbed a convenience store, forced the cashier into her car, drove into the country and there compelled the cashier to engage in various sexual acts (DX 1). 1/

Record at Guilty Pleas

On July 24, 1975, McWilliams pled guilty to the offenses of aggravated robbery (Cause No. 10,169), aggravated

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1/ References are to the record as it appeared before the Texas Court of Criminal Appeals. "DX" refers to Defendant's Exhibits presented in connection with his habeas corpus petition. "SF" refers to the Statement of Facts of the habeas corpus proceeding before the District Court of Fort Bend County, Texas. "TR" refers to the transcript of the habeas corpus proceedings. DX 1 contains the Statement of Facts and State's Exhibits from McWilliams' trial at which he entered his guilty pleas.

rape (Cause No. 10,170) and aggravated kidnapping (Cause No. 10,171) in the 23rd Judicial District Court of Fort Bend County, Texas (DX 1, p. 3). During the course of receiving his guilty pleas, the Court was informed by McWilliams that he had been in two mental institutions in 1972 and had escaped from one (DX 1, pp. 6-11). On further inquiry, the Court was told that neither McWilliams nor his counsel knew the diagnoses of the psychiatrists while he was in the mental institutions (DX 1, p. 8).

The Court was thereafter presented with a two page report of a psychiatric examination by Dr. Benjamin Sher which the Court read (DX 1, pp. 13-14). Dr. Sher examined McWilliams on May 24, 1975, in the Fort Bend County Jail at the request of the District Attorney and concluded: "Although Mr. McWilliams was only selectively cooperative his psychiatric picture indicated that he is of sound mind and competent to understand

the nature of the proceedings against him and to properly assist in his own defense" (DX 1, SX 9).

Dr. Sher's report did not explain the reasons for the 1972 hospitalization, nor did Dr. Sher indicate that he had reviewed any medical records of McWilliams. Dr. Sher's report noted that McWilliams "stated that he was sent to the hospital by the court" (DX 1, SX 9). The report further stated that McWilliams "told me that he cut his wrist" (DX 1, SX 9). Finally, McWilliams "gave a long history of delinquent behavior" including receiving an Undersirable Discharge from the service. At no time did the Court inquire about the judicial commitment Dr. Sher reported, nor any suicide attempt, nor did the Court inquire into McWilliams' history of aberrant behavior. McWilliam's guilty pleas were accepted and three concurrent sentences of thirty years were imposed for aggravated

robbery, aggravated rape and aggravated kidnapping.

Record at Writ of Habeas Corpus Hearing

As the record in the subsequent Writ of Habeas Corpus proceedings now indicates, McWilliams attempted suicide on May 2, 1969 (DX 4) and on May 30, 1969 (DX 5). On January 10, 1972, McWilliams, for a third time, again attempted suicide in the jail of Schenectady, New York, while awaiting trial for robbery, larceny, attempted rape and escape (DX 6). When he attempted suicide in the New York jail, McWilliams heard voices telling him he was no good (DX 7). As a result of that incident, on January 18, 1972, the County Court of the County of Schenectady, State of New York, found that McWilliams "as a result of mental disease or defect lacks capacity to understand the proceedings against him or to assist in his own defense" and entered an "Order of Commitment" to the custody of the

Commissioner of Mental Hygiene of the State of New York for one year (DX 2).

On January 19, 1972, McWilliams was admitted to the Mattewan State Hospital in New York (DX 7). The official diagnosis of the Mattewan State Hospital staff was "Psychotic Depressive Reaction; Personality Disorder, Paranoid Type; Drug Dependence, Cannabis Sativa" (DX 7). McWilliams remained in the Mattewan State Hospital until September 27, 1972, when he was transferred to the Utica State Hospital (DX 7). On October 9, 1972, McWilliams escaped from Utica (DX 7). McWilliams' final official mental diagnosis on January 22, 1973 was "Psychotic Depressive Reaction; Personality Disorder, Paranoid; Drug Dependence, Marijuana"; he was further diagnosed "Not Competent. Not Employable. Unimproved" (DX 7).

On March 22, 1975, McWilliams was arrested in Fort Bend County, Texas, and

charged with aggravated robbery, aggravated rape and aggravated kidnapping (DX 1, SX 4). On April 21, 1975, McWilliams slashed his wrists while in the Fort Bend County Jail after hearing voices telling him to kill himself (DX 8). McWilliams was treated at Ben Taub Hospital in Harris County, Texas, where the initial intake medical report described him as "chronic schizophrenic" (DX 8).

On November 18, 1979, Dr. Lucian T. Jones, a clinical psychologist, examined McWilliams in the Fort Bend County Jail. After the interview and his review of McWilliams' medical records, Dr. Jones stated that "Stephen A. McWilliams, white male, age 34, has and is experiencing a thought disorder and can be considered to have been chronically psychotic for a number of years." Dr. Jones further indicated that McWilliams was not competent at the time he entered his guilty plea on July 24, 1975 (DX 3).

Court Action on McWilliams' Writ of Habeas Corpus

In his Petition for Writ of Habeas Corpus, his First Supplemental Petition and his Second Supplemental Petition, McWilliams alleged, (a) that he was incompetent at the time of his pleas, (b) that the trial court should have conducted a competency hearing before accepting his pleas, and (c) that two of his three convictions violated the Texas carving doctrine. 2/ Pursuant to Texas law, 3/ McWilliams' claims first came before the District Court of Fort Bend County, Texas, for a hearing and findings of fact. The District Court agreed that two of the charges against McWilliams violated the carving doctrine and should be dismissed (SF 28). The District Attorney concurred (SF 28).

2/ See, Appendices VI, VII and VIII, for the exact language of McWilliams' Petitions.

3/ TEX. STAT. ANN. art. 11.07 (Vernon 1977).

The Court of Criminal Appeals in an 8-1 en banc decision dismissed McWilliams' aggravated kidnapping and rape convictions while upholding his sentence for aggravated robbery. Ex Parte Stephen McWilliams, 634 S.W.2d 815 (Tex. Crim. App. 1982). 4/ The aggravated rape charge was dismissed for reasons no longer relevant. The aggravated kidnapping charge was dismissed because it violated the Texas carving doctrine.

However, the Court found that the evidence before the Trial Court at the time McWilliams' pled guilty to robbery failed to raise "a bona fide doubt" as to his mental competence and therefore did not require a hearing.

Thereafter McWilliams filed with the Court of Criminal Appeals a motion for rehearing, reasserting his incompetence at the time of his guilty pleas and the

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4/ See Appendix I for the Court of Appeals' opinion.

Trial Court's failure to order a competency hearing. The State of Texas also sought a rehearing, arguing, inter alia, that the carving doctrine should be abandoned. In its Opinion on State's Motion for Rehearing, the Court of Criminal Appeals abandoned the carving doctrine and McWilliams' conviction for aggravated kidnapping was reinstated. Ex Parte McWilliams, 634 S.W.2d 815. 5/

McWilliams filed a second motion for rehearing, raising again the competency issues and also alleging that the Court's retroactive application of its decision to abandon the carving doctrine constituted an ex post facto law. This second motion was also denied. 6/

5/ See Appendix II, for the Court of Appeals' opinion.

6/ See Appendix IV, for notice of the denial of McWilliams' motion. See Appendix III for the opinion dissenting from denial of McWilliams' second motion.

REASONS FOR GRANTING THE WRIT

I. THE FACTS KNOWN TO THE TRIAL COURT RAISED SUFFICIENT DOUBT AS TO McWILLIAMS' COMPETENCY TO REQUIRE THAT THE TRIAL COURT DETERMINE McWILLIAMS' COMPETENCY BEFORE HE PLED GUILTY.

Before accepting McWilliams' guilty pleas, the Trial Court was made aware that McWilliams had been confined in two mental institutions a few years earlier, that his commitment to the first institution was pursuant to a judicial order, that his stay at the second institution was cut short by his escape and that McWilliams had attempted suicide. Despite this overwhelming evidence of possible incompetency, no competency hearing was instituted. 7/ Indeed, the Trial Court failed even to conduct a

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7/ Article 46.02 of the Texas Code of Criminal Procedure, which was in effect at the time of McWilliams' guilty plea, indicates that McWilliams was entitled to a competency hearing. In pertinent part Article 46.02 says:

Footnote continued on next page.

reasonably thorough interrogation of McWilliams about these indicia of incompetence.

Conviction of a person while he is legally incompetent violates the Due Process Clause of the Fourteenth Amendment of the United States Constitution. Dusky v. United States, 362 U.S. 402 (1960); Bishop v. United States, 350 U.S. 961 (1956). Pursuant to this principle, this Court has declared that failure to conduct a competency hearing when a judge is aware of facts which raise reasonable doubt as to a defendant's competence is

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Footnote continued from previous page.

> Sec. 2(a). The issue of the defendant's incompetency to stand trial shall be determined in advance of the trial upon the merits if the court determines there is evidence to support a finding of incompetency to stand trial on its own motion ...
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> Sec. 4(a). If the court determines that there is evidence to support a finding of incompetency to stand trial, a jury shall be impaneled to determine the defendant's competency to stand trial.

likewise a violation of the Due Process Clause. Pate v. Robinson, 383 U.S. 375 (1966); Drope v. Missouri, 420 U.S. 162 (1975). In Drope v. Missouri, this Court described its landmark Pate decision as follows:

> In Pate v. Robinson . . . we held that the failure to observe procedures adequate to protect a defendant's right not to be tried or convicted while incompetent to stand trial deprives him of his due process right to a fair trial.

Id. at 172 (emphasis added).

Pate and Drope are the only two Supreme Court cases which discuss the circumstances under which a trial court must on its own motion thoroughly investigate a defendant's competency to stand trial. In both those cases the Court found that further investigation should have occurred. A comparison of the facts in those cases with the facts in the present case compels the conclusion that McWilliams also was

entitled to further investigation of his competence by the Trial Court.

In Pate the evidence consisted of witnesses who recounted episodes of irrational behavior by defendant, a previous conviction of defendant for killing his son and a previous commitment of defendant by his family to a psychiatric nospital. But the hospital had declared defendant "recovered," Pate v. Robinson, 383 U.S. at 380, and a state psychiatrist had determined that defendant "knew the nature of the charges against him and was able to cooperate with counsel when he examined him two or three months before trial," Id. at 383, and during trial defendant had been alert and able to conduct intelligent conversations with the judge. Id. at 385. On these facts the Supreme Court held defendant entitled to a competency hearing. In a later case, the Court characterized its Pate holding as follows:

> [T]he Court did . . . indicate that a history of irrational behavior is a relevant factor which, on the record before it, was sufficient to require further inquiry notwithstanding Robinson's [normal] demeanor at trial and the stipulated opinion of a psychiatrist that [defendant] knew the nature of the charges against him and could cooperate with counsel when the psychiatrist examined him two or three months before.

Drope v. Missouri, 420 U.S. at 172, n. 9.

In Drope the evidence included a psychiatric report stating that defendant, "although cooperative in the examination, 'had difficulty in preparing well,' 'had a difficult time relating,' and ... 'was markedly circumstantial and irrelevant in his speech.'" The report concluded that defendant had a "borderline mental deficiency" and "chronic anxiety reaction with depression." Id. at 175-176. The court was also informed of various episodic irrational acts of defendant, and during trial defendant attempted suicide. On the other hand, the psychiatric report stated that defendant did not have "'any delusions,

illusions, [or] hallucinations. . .,' 'was well oriented in all spheres,' and 'was able, without trouble, to answer questions testing judgment.'" Id. at 175. Further, defendants' demeanor during trial was normal. On these facts the Court again held that the trial court on its own motion should have conducted a competency hearing.

Although the Trial Court in this case faced a set of facts strikingly similar to those in Pate and Drope, it failed to order a competency hearing or even to conduct a reasonably thorough interrogation of McWilliams. It did not ask McWilliams a single question about slashing his wrists. Had it pursued the matter, it might have discovered several suicide attempts, including a recent attempt in the Texas Fort Bend County Jail while McWilliams awaited trial for the very offenses for which he was attempting to plead guilty. Questioning by the Court about the most

recent suicide attempt would have revealed that McWilliams had heard voices telling him to kill himself and that after the slashing of his wrists he was taken to Ben Taub Hospital in Harris County, Texas where an initial intake report described McWilliams as "chronic schizophrenic" (DX-8).

Besides the suicide attempts, th Court also failed to question McWilliams about a prior judicial commitment to a mental institution. An adequate investigation would have shown that McWilliams' commitment was due to a determination of incompetence to stand trial in New York under circumstances almost identical to those which reoccurred in Texas. The few questions the Court did ask concerned McWilliams' treatment and diagnoses at the mental institutions where he had stayed. McWilliams reported that he had received medication and psychiatric consultation, but did not know the doctors' diagnoses (DX 1, pp. 8-9).

Finally, the Court asked no questions about the various incidents of aberrant and irrational behavior brought to the Court's attention in Dr. Sher's report.

All the above indicia of incompetency were ignored by the Trial Court. Instead, the Court and McWilliams' court-appointed counsel chose to rely entirely on the state-hired psychiatrist's two-page report, written after a brief jailhouse interview of McWilliams. (DX 1, p. 8). The report gave no explanation of McWilliams' stays at mental institutions, no details of the reported judicial commitment nor did it indicate that any of McWilliams' medical records had been reviewed - even those at nearby Ben Taub Hospital.

In Drope v. Missouri, 420 U.S. at 180, this Court stated:

> The import of our decision in Pate . . . is that evidence of a defendant's irrational behavior, his demeanor at trial, and any prior medical opinion on competence to

> stand trial are all relevant in determining whether further inquiry is required [of a court], but that even one of these factors standing alone may, in some circumstances, be sufficient.

In other words, the substantial presence of just one of the three elements listed here by the Court requires a judge to conduct further reasonable inquiry. The Trial Court had abundant evidence of past medical determinations of mental illness and of irrational behavior but failed to discharge its duty of further inquiry.

When the issue of McWilliams' incompetency was presented to the Texas Court of Criminal Appeals in connection with this Writ of Habeas Corpus, the Court of Criminal Appeals failed to consider even the full range of information actually known to Trial Court which received McWilliams' guilty pleas. The Court of Criminal Appeals erroneously stated:

> In the instant case, the only matters which could have raised the question of competency at the time of trial was

> information concerning petitioner's two prior commitments at mental institutions.

Ex Parte McWilliams, Id. at 820. As is demonstrated above the psychiatrist's report, read by the Trial Court, refers to suicide attempts, a judicial commitment, and a history of aberrant behavior. This evidence "raised the question of competency." Id.

Furthermore, the Court of Criminal Appeals dismissed the evidence of McWilliams' incompetency presented in connection with the Writ of Habeas Corpus with the observation that there was "no showing that any of the evidence from the evidentiary hearing was before the trial court at the time petitioner pled guilty." Id. at 821. The answer to this off-hand treatment of the case has previously been given by this Court:

> Rather, the dispute concerns the inferences that were to be drawn from the undisputed evidence and whether, in light of what was then known, the failure to make further inquiry

> into petitioner's competence to stand trial, denied him a fair trial.

Drope at 174-175 (emphasis added). In short, the evidence developed in connection with the writ of habeas corpus established what could have been known had there been adequate inquiry.

Rather than a full inquiry into the known facts suggesting mental incompetency, the trial court merely went through the form of an inquiry. The attitude is indicated by the following colloquy at the time of McWilliams' guilty plea:

> The Court: All right, what was the diagnosis by the psychiatrist or the doctor which examined you; did they tell you?
>
> The Defendant: Various things, I don't know.
>
> Mr. Schwartz [McWilliams' counsel]: We don't really know what they said. We had him examined here, the State had him examined and said he was all right.

> The Court: Well, I've got to get these questions in the record. (DX 1, p. 8)

This case thus squarely presents this Court the opportunity to define what constitutes "adequate" procedure and sufficient "inquiry" by a trial court upon the suggestion of mental incompetency. Clearly McWilliams was not accorded "adequate" procedure or "further inquiry" into his competence; had the Court merely scratched the surface of the matters presented, McWilliams incompetency would have been manifest.

II. THE TEXAS COURT OF CRIMINAL APPEALS UNEXPECTEDLY ABANDONED TEXAS' CARVING DOCTRINE AND RETROACTIVELY AND AS AN EX POST FACTO LAW UPHELD McWILLIAM'S CONVICTION FOR THE OFFENSE OF AGGRAVATED KIDNAPPING

Prior to this case, for one hundred and five years the courts of Texas consistently construed the double jeopardy provision of the Texas Bill of Rights, art. I, § 14, as mandating the carving doctrine. See e.g., Wilson v. State, 45

Tex. 76 (1876); Herera v. State, 35 Tex. Crim. 607, 34 S.W. 943 (1896); Paschal v. State, 49 Tex. Crim. 111; 90 S.W. 878 (1905); Douthit v. State, 482 S.W.2d 155 (Tex. Crim. App. 1971). The carving doctrine prohibits prosecution for more than one offense when several offenses occur in one continuous criminal episode. See, Wilson v. State, 45 Tex. 76. As of the time of McWilliams' alleged crimes, the carving doctrine was the law of Texas.

When McWilliams alleged in his Writ of Habeas Corpus that his tripartite conviction of robbery, kidnapping and rape violated the carving doctrine, both the District Attorney of Fort Bend County, Texas (S.F. 28) and District Court agreed (S.F. 28). On appeal in an en banc 8-1 decision the Texas Court of Criminal Appeals likewise held that the carving doctrine had been violated. Ex Parte McWilliams, 634 S.W.2d 815, 817. Then, as an afterthought, the State

decided to attempt to persuade the Court of Criminal Appeals to abandon the carving doctrine. Its motion for rehearing was granted and the court bluntly declared,

> [T]he conviction for aggravated kidnapping was vacated and the indictment was ordered dismissed because the conviction. . .violated the carving doctrine. We have now re-examined the doctrine of carving and have concluded that it should be abandoned.

Id. at 822. McWilliams thereafter filed a second motion for rehearing objecting to retroactive application of the Court's decision to abandon carving. That motion was denied.

Article I, Section 10, of the Constitution of the United States forbids the enactment of ex post facto laws by the states. In Marks v. United States, 430 U.S. 188, 191 (1977), this Court stated that the principle underlying the Ex Post Facto Clause is "the notion that persons have a right to fair warning of that conduct which will give rise to

criminal penalties." So basic is that principle that this Court has found it also to inhere in the concept of due process; the right not to be subjected to a law retroactively enhancing the punishment for a crime is one of the components of the due process guarantees of the Fifth and Fourteenth Amendments. Bouie v. City of Columbia, 378 U.S. 347 (1964); Marks v. United States, 430 U.S. 188. The due process guarantee against ex post facto laws applies to judicial, as well as legislative, decisions. Bouie, Id.; Marks, Id. A judicial decision which unforeseeably alters past judicial construction of a law in a manner which expands the scope of potential criminal liability may not be retroactively applied. Bouie, Id.; Marks, Id.; United States v. Goodheim, 651 F.2d 1294 (9th Cir. 1981), reh'g denied, 664 F.2d 754 (9th Cir. 1981); Love v. Fitzharris, 460 F.2d 382 (9th Cir. 1972), vacated, 409 U.S. 1100 (1973); Foster v. Barbour, 462 F. Supp.

582 (W.D.N.C. 1978), aff'd, 613 F.2d 59 (1980).

The Texas Court's decision constituted an unforeseen alteration of past judicial construction of the Texas Constitution in a manner which expanded the scope of McWilliams' potential criminal liability. See, Bouie v. City of Columbia, 378 U.S. 347; Marks v. United States, 430 U.S. 188.

At the time McWilliams allegedly committed the crimes, the carving doctrine permitted conviction for only one offense in connection with a continuous assualt. He could thus have been convicted of robbery or kidnapping - not both. This was admitted by the State of Texas at every level until the Court of Criminal Appeals abandoned the carving doctrine in this case. Thereafter, the conviction for kidnapping was upheld. It is difficult to conceive of a clearer instance of retroactive change of a law

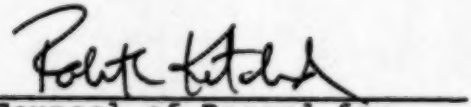
to sustain an otherwise impermissible criminal conviction.

CONCLUSION

For the reasons set forth above, it is respectfully submitted that the petition for Writ of Certiorari should be granted.

Respectfully submitted,

ROBERT L. KETCHAND



Counsel of Record for Petitioner

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CERTIFICATE OF SERVICE

I, Robert L. Ketchand, the attorney for the Petitioner, herein, and a member of the Bar of the Supreme Court of the United States, hereby certify that, on the 13th day of September, 1982, served three copies of the foregoing Petition for Writ of Certiorari to Mr. Robert Huttash, State Prosecuting Attorney P.O. Box 12405, Austin, Texas 78711 and to Mr. William Meitzen, District Attorney, Fort Bend County Courthouse, Richmond, Texas 77469 by first class United States mail, certified and postage prepaid in accordance with Rule 28.3 of the Rules of the Supreme Court.

Robert Ketchand

ROBERT L. KETCHAND
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